STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals of Michigan

FREDA ALIBRI,

Plaintiff/Appellant,

Supreme Court No. 123091

- vs -

Court of Appeals No. 228921

DETROIT WAYNE COUNTY STADIUM AUTHORITY,

Defendant/Appellee.

Circuit Court Case No. 98-818620 CK

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# BRIEF OF NON-PARTY INSTITUTE FOR JUSTICE AS *AMICUS CURIAE*

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## ISSUE PRESENTED

1. May a government entity assert that it will condemn property in order to secure an agreement to sell when the government in fact has no power to take the property?

## MOTION FOR LEAVE TO FILE AND INTEREST OF *AMICI CURIAE*

Pursuant to Michigan Court Rule 7.306(D), the Institute for Justice hereby moves for leave to file this brief as *amicus curiae* in support of appellants. The Brief conforms to Michigan Court Rules 7.309(A-B) and 7.212(B) and addresses the question of whether a government agency may threaten eminent domain, alleging a public use for the threatened condemnation, when the true purpose of the acquisition is to satisfy a private party.

The Institute for Justice is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The Institute is committed to the principle that "[i]ndividual freedom finds tangible expression in property rights" and that such rights are imperiled by arbitrary use of the power of eminent domain for the benefit of private interests. *See United States v. James Daniel Good*, 510 U.S. 43, 61 (1993). It litigates property rights cases throughout the country and files *amicus curiae* briefs in important cases nationwide, including every major U.S. Supreme Court property rights case of the past ten years. The Institute regularly represents property owners fighting condemnation of their homes or businesses for the benefit of private parties. This brief relies in large part on the Institute's experiences in representing and talking to individuals fighting the condemnation of their property for private parties.

The Institute also submitted an *amicus curiae* brief in another case under consideration by this Court, County of Wayne v. Hathcock, Supreme Court Nos. 124070-124078. The instant brief does not cover the same legal questions but instead presents significant caselaw from other jurisdictions disapproving the use of pretextual justifications for condemnations. The *amicus*

brief then explains why pretextual threats of condemnation similarly violate the constitutional guarantee of public use. This brief does not address any factual disputes between the parties.

## I. GOVERNMENT MAY NOT THREATEN CONDEMNATION FOR A PUBLIC PURPOSE AS A PRETEXT FOR THE ACQUISITION OF PROPERTY FOR PRIVATE USE.

The Michigan Constitution requires eminent domain to be for public use and prohibits eminent domain for private use. See, e.g., Tolksdorf v. Griffith, 464 Mich. 1 (2001). In addition, legislative authority is necessary before an agency may use eminent domain. See, e.g., Sinas v. Lansing, 382 Mich. 407, 411 (1969). Courts hold that government may not make pretextual condemnations, because pretext subverts both statutes and the Constitution. For example, if an agency seeks property for a new headquarters, but claims the purpose of condemnation is a road, then it may well be condemning for a purpose for which it has no legislative authorization to condemn. See, e.g., Department of Transportation v. Stapleton, 2003 Colo. App. LEXIS 1108 (Colo. App. July 3, 2003) (department of transportation could not condemn parking lot for use by ski facility where statute did not permit condemnation for parking and transit facility). When the condemnation benefits a private party, it is particularly important that the purpose of the condemnation be the achievement of a public goal, not a private one. See, e.g., City of Center Line v. Chmelko, 416 N.W.2d 401 (Mich. App. 1987) (dealership's plan showed that property would be used for inventory storage, rather than as a site creating jobs). Ample caselaw rejects the use of pretext for the taking of property and for the inclusion of property in redevelopment plans. Pretext is similarly unacceptable in making threats of eminent domain.

Courts universally reject pretextual condemnations. See, e.g., Cottonwood Christian Center v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1229-30 (C.D. Cal. 2002) (court held

that it appeared that defendants had found "a potential user for property they did not own, and then design[ed] a development plan around that new user"); 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), appeal dismissed as moot, 1003 U.S. App. LEXIS 4197 (9th Cir. 2002) (stated purpose of preventing future blight pretext for taking land to appease Costco); Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227, 232-34 (Del. 1986) (parking authority nominally condemned land for parking, while in reality trying to retain private newspaper in city) (citing Michigan precedent); City of Miami v. Wolfe, 150 So.2d 489, 490 (Fla. 1963) (condemnation had pretext of extending roadway, but really for acquisition of valuable riparian rights); Earth Management Inc. v. Heard County, 283 S.E.2d 455, 460-61 (Ga. 1981) (condemnation nominally for a park but really to prevent construction of waste disposal site); Pheasant Ridge Assoc. v. Burlington Town, 506 N.E.2d 1152, 1157 (Mass. 1987) (pretext of condemnation was park and moderate income housing, while real purpose was exclusion of lower income housing); Essex Fells v. Kessler Inst, 673 A.2d 856, 858 (N.J. Law Div. 1995) (borough tried to condemn property in order to prevent owner from putting a nursing facility on the property).

Many courts also have criticized the pretextual designation of an area as blighted in order to achieve some goal other than curing blight. See, e.g., AvalonBay Communities, Inc. v. Town of Orange, 775 A.2d 284 (Conn. 2001) (finding that inclusion of property in redevelopment plan was pretext for preventing impending private development); City and County of Denver v. Block 173 Associates, 814 P.2d 824, 830 (Colo. 1991) (reversal of dismissal where owners alleged city had designated a 15-block area blighted, even though its intention was solely to acquire three unblighted blocks within that area for the benefit of a private developer); Prestonia Area Neighborhood Assoc. v. Abramson, 797 S.W.2d 708, 711 (Ky. 1990) (rejecting improper blight

designation and condemnations for commercial development in the absence of valid blight designation); In Re Petition of Seattle, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build shopping center, where purpose was not elimination of blight).

Courts also deny the power to take when condemnation is used, as in the instant case, to generate a profit, repay a debt, or satisfy an obligation to another party. See, e.g., Patel v. Southern Calif. Water Co., 119 Cal. Rptr. 2d 119, 120 (Cal. App. 2002) (water company condemned easement in order to lease easement at a profit to cell phone company); Denver West Metropolitan Dist. v. Geudner, 786 P.2d 434, 436-37 (Colo. App. 1989) (pretext of condemnation was flood control, but real purpose was to enable sale of government property at a profit); City of Dayton v. Keys, 252 N.E.2d 655, 660-61 (Ohio Ct. Comm. Pleas 1969) (property not necessary for urban renewal condemned in order to satisfy contractual obligation to single developer); Redevelopment Authority v. Owners, 274 A.2d 244, 252 (Pa. Cmmwlth 1971) (land taken on pretext of removing blight but actually to provide substitute property to another party whose other property was being condemned for a public project); see also Dickgieser v. State of Washington, 76 P.3d 288 (Wash. App. 2003) (land to be owned by state for logging, with the logging funds to be used to support public schools, was not a public use).

The doctrine prohibiting pretextual condemnations is a close corollary to the constitutional requirements of public use and reasonable assurance of public use. Essentially, without some assurance that the private party will use the property to public benefit, the taking will result in a benefit primarily to the private party. See Casino Reinv. Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. 1998) (discussing relationship between pretext and future assurances doctrines). Michigan, of course, already requires public use and a plan for use of the property

before condemnation. See, e.g., City of Troy v. Barnard, 183 Mich. App. 565, 568-69 (1990). Allowing pretextual condemnations would subvert the public use requirement.

Even if the agency is not acting intentionally or in bad faith, a pretextual condemnation is still unconstitutional if it has the "consequences and effects" of primarily benefiting a private party. See, e.g., Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227, 232 (Del. 1986); Casino Reinv. Dev. Auth. v. Banin, 727 A.2d 102, 104 (N.J. Super. 1998). In the instant case, the Stadium Authority apparently did not realize that it did not have the power to condemn the Alibri property and was instead pressuring the Alibri's to sell so that the property could go to another private party. This Court need not find the Authority's actions to be in bad faith in order to conclude that the threat of condemnation was pretextual. It had the consequence and effect of transferring the property to another private party for admittedly private use.

Courts do not allow governments to condemn property on a pretext, claiming one reason while the actual purpose of the condemnation is something else. If agencies could condemn for a reason other than their stated purpose, there would be no guarantee that the condemnations would be for public use. Nor do courts permit declarations of blighted areas when the purpose of the declaration is for some reason other than curing blight. Courts especially frown on condemnations where a public purpose serves as a pretext for fulfilling a promise or providing a benefit to a third party. Yet, as this Court knows, few condemnation actions go to court at all. The right of individuals to be free of condemnations for private use would have little practical meaning if government could threaten condemnation, using the pretext of a public purpose, when the government actually sought to acquire the property for the benefit of a private party. Most owners would agree to sell and never know or, as in this case, not find out until after the sale that the acquisition was for a private purpose. To maintain the constitutional guarantee of public use

for condemnations and prevent claims of public use as a pretext for private benefit, this Court should also forbid the threat of condemnation for a public purpose, when the real reason for the acquisition is a private one.

## II. IF CONDEMNING AUTHORITIES ARE ALLOWED TO MISREPRESENT THE INTENDED USE OF TARGETED LAND, CONDEMNATIONS FOR PRIVATE USE WILL GO VIRTUALLY UNCHECKED.

The instant case will have much broader consequences than its impact on Freda Alibri. It is one of the few cases this Court is likely to ever consider regarding the propriety of a threat of eminent domain. Most people never challenge the use of eminent domain, so most threats to use eminent domain result in the owner selling the property with no court ever evaluating the propriety of the condemnation. This case brings into sharp relief the practice of using the threat of eminent domain in order to induce a sale. It is particularly important then that this Court deny agencies the ability to threaten eminent domain when the agency has no plans or power to in fact condemn the property.

The threatened use of eminent domain to transfer property from one private owner to another for private use happens all the time. From the beginning of 1998 to the end of 2002, there were more than six thousand properties that government threatened to take for private parties. See Dana Berliner, Public Power, Private Gain 2 (2003). Michigan accounted for over 173 of these instances, in addition to another 138 properties actually condemned for private parties. See id. at 100.

When confronted with the threat of eminent domain, 75% of families do not even challenge the amount of compensation initially offered, let alone attempt to resist the condemnation itself. See Family Legal Guide (ABA 2002). The reasons that families decide not to fight are often practical: A condemnation battle is extremely expensive, both in time and

money. Most condemnation attorneys receive a contingency payment based on the final amount of the compensation award. Many refuse to actually challenge the power to take, and those that do must charge substantial fees. Public use challenges, for example, often require a trial. Most individuals confronting eminent domain simply cannot afford to pay a lawyer to fight the condemnation, and they face the prospect of spending a substantial amount of money to relocate if they lose the uphill battle against the condemning authority. Each year, hundreds of people contact the Institute for Justice, asking for pro bono assistance so that they can fight the condemnation of their home or business for the private use of a developer or other politically connected business. We are unable to represent more than a few, and most of the others are unable to afford legal representation for protracted litigation.

Legal battles against the power to use eminent domain drag on for years and disrupt lives. The Institute has seen many cases last from three to five years. During the fight, the families' lives are in limbo; they can't make major investments in their homes or make firm plans for the future because they're not sure if or when they will be uprooted.

Faced with the prospect of a drawn-out and expensive battle, most people choose to sell their property "voluntarily." Because most threatened condemnations will never undergo judicial scrutiny, condemning authorities have an incentive to press their luck – to keep pushing back the outer boundaries of what constitutes a "public use."

In all cases that the Institute litigates, a condemning authority transfers property from one private owner to another and claims that the intended use of the land – a shopping center, for instance – is a "public use" because it will bring economic prosperity to the area. In this case, the Stadium Authority did something even less defensible. Although the Authority claimed it had a public purpose for the condemnation, in fact it had no plans and no necessity for the Alibri

property. It borrowed money from the developer to pay for the condemnation of the Alibri property and then intended to turn the property over to the private party.

Because she believed that the Stadium Authority intended to take her land for a public use, Alibri decided to settle; she couldn't fight a private use that was not disclosed to her. If this Court upholds the ruling of the Court of Appeals, a dangerous precedent will be set: Condemning authorities will have an incentive to use the threat of eminent domain to acquire property for private use by misrepresenting their reasons for wanting the property. With no approved development plan and no intention to condemn, an agency could threaten to condemn someone's property, obtain a "voluntary" agreement, and then transfer it to another private party for the sales price. In the case before this Court today, the Stadium Authority seeks from a judicial license for government agencies to use the threat of eminent domain for an admittedly private use. Such a license can only encourage the worst possible behavior on the part of both government and private parties who want other people's property.

Conversely, individual owners will have yet another disincentive to fight condemnations. While an individual has a chance to prevail if the intended use of her land appears to be private, she will understandably believe that she cannot prevail if she is told instead that the condemnation is for a public highway or a police station. Because condemning authorities will be able to use a misrepresentation to avoid a condemnation battle, even fewer people will have the opportunity to assert constitutional protections against private-use condemnations in court. If this Court rules in favor of the Stadium Authority, it will insulate the practice of threatening eminent domain for private use from judicial scrutiny. Instead, *amicus* respectfully requests the Court to rule that government agencies may not induce people to give up their property by threatening the use of eminent domain when, as here, the government has no power to condemn

and the purpose of the threat is to acquire property at the behest of a private party. The Michigan Constitution forbids condemnation for private use. This Court should hold that it also forbids threatening condemnation for private use.

Respectfully submitted this 28th day of January 2004, by:

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## CERTIFICATE OF SERVICE

I, Gabriel Hudson, hereby certify that on January 21, 2004 a copy of BRIEF OF NON-PARTY INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* was served on the following parties via first class mail:

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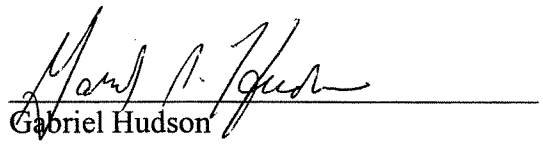

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